

Online Safety Branch, Content Division
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 594
Canberra ACT 2601

10 February 2021

EROS ASSOCIATION SUBMISSION ON DRAFT ONLINE SAFETY BILL

The Eros Association is Australia's leading adult industry body, with over 25 years of experience in dealing with industry specific issues. Eros supports a responsible and non-discriminatory legal framework for adults-only businesses.

Eros welcomes the opportunity to provide a submission on the draft Online Safety Bill.

It is the position of Eros that:

- The online content scheme under Part 9 of the Bill should be removed as it is not related to issues of online safety and is likely to harm the livelihood of sex workers, adult media performers and adults-only businesses.
- The role of the eSafety Commissioner should be to focus on non-consensual, abusive and harmful content and not imagery of consensual sexual activity between adults.

BACKGROUND

As we noted in our previous submission,¹ Eros objects to the conflation of media depicting consensual sex between adults with abuse-based imagery and terrorist recruitment media.

A majority of Australians consume adult media (or 'pornography') on a regular basis, with most surveys finding that around three quarters of men (76%) and over one-third of women (41%) have looked at pornographic material in the past year.²

¹ Eros Submission to Consultation on Online Safety Act, 3 February 2020, https://www.eros.org.au/wp-content/uploads/2020/02/Submission_to_Consultation_on_a_new_Online_Safety_Act.pdf

² Rissel C, Richters J, de Visser RO, McKee A, Yeung A, Caruana T. A Profile of Pornography Users in Australia: Findings From the Second Australian Study of Health and Relationships. J Sex Res. 2017 Feb;54(2):227-240. doi: 10.1080/00224499.2016.1191597. Epub 2016 Jul 15. PMID: 27419739.

A survey of Australian adult media producers undertaken by the Eros Association in 2018 found that most Australian producers were female and operated as producer/performers.³ Moreover, half of all producers identified as belonging to the LGBTIQ+ community.

Under this Bill, adult media for online content regulation likely encompasses advertising for sex work services, adult entertainment and adult retailing, impacting a broad range of industries.

It's suggested that Part 9 of the Bill should be removed in order to limit the scope of enforcement powers to content which is demonstrably harmful.

BROAD REACH

The current online content scheme (Part 9) within the Bill is broad reaching, incorporating media which is non-violent, consensual and depicts adults.

Part 9 is largely focused on sexually explicit media, providing two categories of material:

- **Class 1 material:** inclusive of media that would be Refused Classification under classification guidelines.
- **Class 2 material:** inclusive of media that would be an X18+ film or a Category 2 under classification guidelines.

Under the current draft, Class 1 material is to be removed within 24 hours from social media,⁴ or from a hosting service,⁵ if a removal notice is issued. This material is also susceptible to deletion from search engines,⁶ and removal from app stores.⁷

Under the current film and publication guidelines,⁸ the following media will be 'Class 1 material':

- Depictions of fetishes, "*such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting*".
- Fictionalised incest fantasies.

³ Eros Association, Adult Media Production Standards 2018, <<https://www.eros.org.au/wp-content/uploads/2019/09/Eros-Adult-Standards-combined-1.pdf>>

⁴ Section 109 Online Safety Bill 2020 (Cth)

⁵ Section 110 Online Safety Bill 2020 (Cth)

⁶ Section 124 Online Safety Bill 2020 (Cth)

⁷ Section 128 Online Safety Bill 2020 (Cth)

⁸ Classification guidelines for Films 2012 <<https://www.legislation.gov.au/Series/F2012L02541>>

Under the current draft, Class 2 material if “provided from Australia” is to be removed within 24 hours from social media,⁹ or from a hosting service,¹⁰ if a removal notice is issued.

Class 2 material includes media depicting consensual sexual activity between adults. It is unclear what “provided from Australia” means in the current draft.

The Australian classification system is currently under review,¹¹ meaning that the categories referred to in the online content scheme will likely soon become obsolete. This raises the possibility of inconsistent legal changes occurring and the need to amend the Act soon after assent.

As drafted, the online content scheme would provide for the removal of many forms of adult content impacting the livelihood of producers, sex workers, adult retailers and adult entertainment venues.

The scheme is so broad reaching it would also limit the sexual expression of Australians online whether or not they are posting sexually explicit content for profit.

It is Eros’ view that the proposed scheme is not in keeping with community standards. Previous government attempts to filter sexually explicit content online have proven very unpopular,^{12 13} and were widely viewed as an infringement on freedom of speech.

The overwhelming majority of Australian pornography users note that adult media has had a ‘positive’ or ‘neutral’ impact on their life.¹⁴ It is therefore inappropriate to regulate this content within a Bill designed to tackle online *harms*.

Social media websites currently have their own community guidelines regarding sexually explicit media. Moreover, parental filters are freely available to restrict access to explicit media.

Eros is of the position that content regulation of otherwise legal activity should be “opt-in” rather than imposed via government censorship.

⁹ Section 114 *Online Safety Bill 2020* (Cth)

¹⁰ Section 115 *Online Safety Bill 2020* (Cth)

¹¹ Review of Australian classification regulation, announced 8 January 2020, <https://www.communications.gov.au/have-your-say/review-australian-classification-regulation>

¹² ‘92% against filter: Whirlpool survey’ ZDNet, 21 February 2010 <<https://www.zdnet.com/article/92-against-filter-whirlpool-survey/>>

¹³ ‘Study casts doubt over net filter support’ Sydney Morning Herald, 12 May 2010 <<https://www.smh.com.au/technology/study-casts-doubt-over-net-filter-support-20100512-uvo0.html>>

¹⁴ Rissel C, Richters J, de Visser RO, McKee A, Yeung A, Caruana T. A Profile of Pornography Users in Australia: Findings From the Second Australian Study of Health and Relationships. *J Sex Res.* 2017 Feb;54(2):227-240. doi: 10.1080/00224499.2016.1191597. Epub 2016 Jul 15. PMID: 27419739.

UNINTENDED HARMS

As the Online Safety Bill is specifically addressed to protect against harms, it's important to consider the unintentional harms of censorship of sexually explicit content.

In the United States, attempts to tackle sex work advertising online through the penalisation of publishers has led to a number of harms.

The Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), removed protections for online publishers who hosted content connected to sex trafficking, which was broadly worded to include consensual adult sex work.

The result of SESTA/FOSTA was the purge of all sexually explicit content from a number of social media sites including Facebook and Tumblr to limit liability, including sex worker profiles,¹⁵ erotic art,¹⁶ and LGBT content.¹⁷

The impact of this change on the wellbeing and livelihood of sex workers cannot be understated.

The legal change has been connected with a decline in earnings for sex workers,¹⁸ increased violence due to insufficient screening options,¹⁹ and an increase in more dangerous street-based sex work.²⁰ The legal change has also not demonstrated effectiveness as an anti-trafficking measure.²¹

The US experience should urge caution in relation to extending liability to platforms for hosting sexually explicit content.

CONCLUSION

Eros is of the view that adults should be able to read, hear, see and play what they want. This, incidentally, is also the chief principle of the National Classification Code.²²

¹⁵ D Blunt and A Wolf, 'Erased: The impact of FOSTA-SESTA and the removal of Backpage on sex workers', *Anti-Trafficking Review*, issue 14, 2020, pp. 117-121

¹⁶ Tumblr's Porn Ban Reveals Who Controls What We See Online, *Wired Magazine*, 4 December 2018 <<https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online/>>

¹⁷ The Dangerous Trend of LGBTQ Censorship on the Internet, *OUT Magazine*, 6 December 2018 <<https://www.out.com/out-exclusives/2018/12/06/dangerous-trend-lgbtq-censorship-internet>>

¹⁸ D Blunt and A Wolf, 'Erased: The impact of FOSTA-SESTA and the removal of Backpage on sex workers', *Anti-Trafficking Review*, issue 14, 2020, pp. 117-121

¹⁹ David Eichert, *It Ruined My Life: FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. Soc. POL'y & L. 201 (2019).

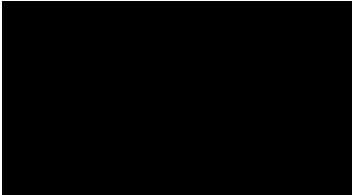
²⁰ Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 *Fordham L. Rev.* 2171 (2019)

²¹ Close Regina A. Russo, *Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship*, 68 *CLEV. St. L. REV.* 314 (2020).

²² National Classification Code <<https://www.legislation.gov.au/Details/F2013C00006>>

Eros is very happy to work collaboratively with the government to ensure adult media in Australia meets community expectation. However, it is our position that Part 9 of the Online Safety Bill should be removed in its entirety in order to focus effectively on online harms.

Kind regards,



Rachel Payne
General Manager

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